Supreme Court, U.S.
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No. 79-1614

# In the Supreme Court of the United States

OCTOBER TERM, 1979

WILMA CHARLENE RILEY, ADMINISTRATRIX OF THE ESTATE OF EDWARD RILEY, ET AL.,
PETITIONERS

*v.*

NEIL GOLDSCHMIDT, SECRETARY, DEPARTMENT OF TRANSPORTATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

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Petitioners contend that the district court erroneously dismissed this action for failure to state a claim under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*

1. Petitioners are the widow and children of Captain Edward A. Riley, an Air Force pilot who died on active duty in the crash of a military aircraft on February 14, 1977 (Pet. App. A-23 to A-24). It is undisputed that petitioners are receiving veterans' death benefits under 38 U.S.C. 401 *et seq.* (Pet. App. A-26 to A-27).

On October 2, 1978, petitioners brought this action under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, in the United States District Court for the Southern District of Indiana. Petitioners based their $4 million claim for damages on the allegation that Captain Riley's death resulted from "intentional misconduct and willful neglect of FAA air controllers" (Pet. App. A-24). On March 20, 1979, the district court dismissed petitioners' action under this

Court's decision in *Feres* v. *United States*, 340 U.S. 135 (1950) (Pet. App. A-20 to A-22). The court of appeals affirmed (Pet. App. A-23 to A-35).

2. In *Feres*, this Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. The Court has recently reaffirmed that holding in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671 (1977). Petitioners acknowledge (Pet. 7) that Captain Riley died in the course of military duty, but they attempt to distinguish *Feres* on the ground that Riley's death is attributable to the activities of civilian personnel (Pet. 18). That distinction has no legal significance. As the Seventh Circuit correctly noted, this Court's decision in *Feres* was based on "the unique situation of a soldier" (Pet. App. A-28).[1] Consequently, the military or civilian status of the alleged government "tortfeasor" is immaterial. Moreover, as the Seventh Circuit also noted (Pet. App. A-29 & n.8), petitioners' argument has been rejected by every court of appeals that has considered it. See *Uptegrove* v. *United States*, 600 F. 2d 1248 (9th Cir. 1979), cert. denied, No. 79-707 (Jan. 21, 1980).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

MAY 1980

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[1] In *Stencel Aero Engineering Corp.* v. *United States*, *supra*, 431 U.S. at 671-672, this Court noted that its decision in *Feres* had been based on the special relationship between a soldier and his government, including the government's provision of "no fault" compensation, as a substitute for tort liability, under the Veterans' Benefits Act, 38 U.S.C. 401 *et seq.*